Supreme Court, U.S.
FILED
OCT 29
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-181

In the Supreme Court of the United States

OCTOBER TERM, 1990

ANDERS MIGDALECK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court's failure to instruct the jury that it could acquit petitioner on the basis of exculpatory accomplice testimony constituted plain error.

2. Whether the indictment was constructively amended by the proof at trial.

3. Whether petitioner is entitled to a new trial under Fed. R. Crim. P. 33 on the ground that the verdict was against the great weight of the evidence.

4. Whether a comment by the district court referring to the honesty of the prosecutor deprived petitioner of a fair trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is not reported, but the judgment is noted at 897 F.2d 530 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1990. A petition for rehearing was denied on May 1, 1990. Pet. App. 26a. The petition for a writ of certiorari was filed on July 27, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on ten counts of mail fraud, in violation of 18 U.S.C. 1341.[1] He was sentenced to 20 years' imprisonment and fined $10,000. Petitioner was also ordered to pay $161,127 in restitution. Pet. App. 25a.

1. Petitioner was a licensed contractor and the owner of two construction companies. He organized and financed a scheme to defraud insurance companies by setting fires to residential homes in order to collect insurance proceeds. The scheme involved the cooperation of homeowners who allowed their residences to be burned and then filed insurance claims for the resulting damage. Petitioner paid the arsonists who set the fires, the intermediaries who arranged for the fires to be set, and the homeowners who allowed their residences to be burned. After claims were filed, the money collected from the insurance companies was deposited in one of petitioner's bank accounts, and he divided the proceeds among the various participants in the scheme. Pet. App. 2a-3a; Gov't C.A. Br. 3-6.

2. When the government offered some documents into evidence on the first day of trial, a dispute arose as to whether all defense counsel had previously received copies of the government's proposed exhibits. After the district court directed the prosecutor to provide each defendant with copies of all the ex-

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[1] The jury acquitted petitioner on nine other counts of mail fraud and on four counts of interstate transportation of securities taken by fraud, in violation of 18 U.S.C. 2314.

hibits, counsel for one of the co-defendants asked if she could verify after each day of trial that each admitted exhibit was used. In response, the district court stated: "I am going to rely on the United States attorney to be honest. He always has been. He always will be." Petitioner and his co-defendants moved for a mistrial later that day based on that comment by the court, which was made in the presence of the jury. The district court denied the motion. Pet. App. 23a; Gov't C.A. Br. 13-16.

3. The government called five accomplice witnesses to testify at trial. Al Meredith, Sr., a "programmer" who made the arrangements to set the fires, testified that petitioner organized the scheme and provided the money to pay the arsonists and to purchase the materials used to start the fires. The testimony of three arsonists—Al Meredith, Jr., Willie Weems, and Adar Hassan—was essentially favorable to petitioner. They testified that the arson fires were represented to petitioner as legitimate losses, and they believed that Al Meredith, Sr., operated the scheme. Pet. App. 4a.

Anita Sackett, a licensed public adjuster who negotiated and submitted insurance claims on behalf of homeowners, also testified as an accomplice witness. She testified that petitioner set her up in the fire adjusting business in order to conceal his scheme and to have control over the submission of the insurance claims and the receipt of the proceeds from the insurance companies. Pet. App. 2a; Gov't C.A. Br. 3-4, 17. She also testified that petitioner instructed her to inflate the amount of the losses on the insurance claims. Pet. App. 9a; Gov't C.A. Br. 17-18.

At the request of a co-defendant, the district court gave a standard instruction on the testimony of accomplices in its charge to the jury. Pet. App. 4a.[2]

4. After the trial, petitioner filed a motion for a new trial pursuant to Fed. R. Crim. P. 33 on the ground that the verdict was against the weight of the evidence. The basis for the motion was petitioner's contention that the testimony of Al Meredith, Sr., was unworthy of belief. The district court denied the motion. Believing that it could not resolve credibility issues on a motion for new trial, the court found no basis to substitute its judgment for that of the jury in evaluating Meredith's credibility. In addition, the court concluded that the other evidence of petitioner's guilt was sufficient to support the verdict. The court noted that the jury was "quite perceptive" and had acquitted petitioner on 13 counts while convicting him on ten counts. Pet. App. 7a-8a; Gov't C.A. Br. 27-29.

5. The court of appeals affirmed. Pet. App. 1a-25a. It first rejected petitioner's claim that the district court's jury instruction on accomplice testimony was flawed in light of *Cool* v. *United States*, 409

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[2] Based on E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 17.06 (3d ed. 1977), the district court instructed the jury as follows (Pet. App. 4a):

> The testimony of one who asserts by his testimony that he is an accomplice may be received in evidence and considered by the jury even though not corroborated by other evidence and given such weight as the jury feels it should have. You should always keep in mind, however, that such testimony is always to be viewed with caution and considered with great care. You should never convict a Defendant upon the unsupported testimony of an alleged accomplice unless you believe that unsupported testimony beyond a reasonable doubt.

U.S. 100 (1972), and *United States* v. *Stulga*, 531 F.2d 1377 (6th Cir. 1976). With respect to that contention, the court determined that although petitioner argued on appeal that the instruction was deficient because it did not state that the jury could *acquit* him based on the testimony of accomplices, he had made no such objection at trial. Rather, he had proposed that the instruction state that "if you believe the evidence of the accomplice, and you feel that in and of itself is sufficient to satisfy you that it is proof of guilt beyond a reasonable doubt, then you may accept it." Pet. App. 4a. In light of his failure to make a "timely and understandable request" for an instruction relating to acquittal, the court held that the plain error standard applied. *Id.* at 6a. Noting that petitioner failed to cite any authority to the contrary, the court found it "manifest that no miscarriage of justice resulted from the [district] court's failure to instruct, sua sponte, on the manner in which the jury might have evaluated the exculpatory accomplice testimony." *Ibid.*

The court of appeals likewise rejected petitioner's claim that Anita Sackett's testimony concerning the inflation of the building loss portion of the insurance claims had resulted in a constructive amendment of the indictment. Pet. App. 9a-10a. Because "the mail fraud charge in the indictment was the same charge described to the jury," the court concluded that "the introduction of the testimony on claim inflation did not change the basic theory of the fraudulent scheme so as to constitute a constructive amendment of the indictment." *Id.* at 10a. It also held that "had the introduction of the evidence constituted an impermissible variance, any error in admitting the evidence was harmless * * * since the testimony at trial centered on the scheme to commit arson, the underlying

basis for the mail fraud charge set forth in the indictment." *Ibid.*

The court of appeals also held that the district court did not abuse its discretion in denying petitioner's motion for a new trial. Pet. App. 7a-8a. Agreeing with petitioner that the district court had incorrectly concluded that it could not consider the credibility of the witnesses in ruling on such a motion, the court of appeals stated that it would be inclined to remand the case "[i]f the sole basis for the district court's [ruling] * * * was that credibility was not a proper subject for [it] to examine." *Id.* at 8a. The court noted, however, that the district court "also found that the other evidence inculpating [petitioner] was sufficient to support the verdict, a conclusion well-supported in the record." *Ibid.* It also noted that the district court had "commented favorably on the jury's ability to evaluate the evidence since it acquitted [petitioner] on some of the charges." *Ibid.* The court accordingly concluded that the jury's guilty verdicts were not against the great weight of the evidence.

Finally, the court of appeals held that the district court did not abuse its discretion by denying the motion for a mistrial after it commented on the honesty of the Assistant U.S. Attorney in the presence of the jury. Pet. App. 23a-24a. The court of appeals emphasized that the comment "was an isolated comment in a rather lengthy trial and * * * was made during a general discussion regarding the identification and introduction of the prosecution's exhibits." *Id.* at 24a. It also noted that "the [district] court, in its instructions to the jury, favorably commented upon the professionalism of every attorney." *Ibid.* The court therefore concluded that the district court's comment did not deprive petitioner of a fair trial.

ARGUMENT

1. Petitioner first contends (Pet. 8-16) that the district court's jury instruction on accomplice testimony constituted reversible error under *Cool* v. *United States*, 409 U.S. 100 (1972). In that case, an accomplice testified for the defense, and his testimony was completely exculpatory. Over the defendant's objection, the trial court instructed the jury to consider the accomplice's testimony only if it concluded that the testimony was true beyond a reasonable doubt. *Id.* at 102. Reversing, this Court held that the instruction placed an improper burden on the defense, obstructed the defendant's Sixth Amendment right to present exculpatory accomplice testimony to the jury and, in effect, reduced the government's burden of proof. *Id.* at 103-104. The Court in *Cool* also found fault with the trial court's instruction that the testimony of an accomplice could support a guilty verdict if the jury believed it proved beyond a reasonable doubt the essential elements of the offense. The Court noted that the instruction was "confusing to say the least" in light of the fact that the only accomplice testimony in that case was exculpatory. *Id.* at 103 n.4. The Court also noted that "even if it is assumed that [the accomplice's] testimony was to some extent inculpatory, the instruction was still fundamentally unfair in that it told the jury that it could convict solely on the basis of accomplice testimony without [also] telling it that it could acquit on this basis." *Ibid.*

As an initial matter, contrary to petitioner's contention (Pet. 11-12), the court of appeals correctly concluded that his challenge to the district court's accomplice instruction was subject to review only for plain error. Petitioner objected to the district court's

accomplice instruction, but "for the reason that the instruction says if you believe that accomplice, then you can go ahead and find guilt." Pet. 11. He submitted that "the appropriate aspect of the charge should be that if you believe the evidence of the accomplice, and you feel that in and of itself is sufficient to satisfy you that it is proof of guilt beyond a reasonable doubt, then you may accept it." *Ibid.* The court of appeals correctly found that petitioner's requested instruction "was not a request that the jury be advised on how to evaluate exculpatory accomplice testimony * * * or a request to instruct the jury that accomplice testimony can provide the basis of acquittal." Pet. App. 6a. Rather, as the court of appeals explained, petitioner's "objection and proposed instruction, in effect, asked the [district] court to instruct the jury that it could accept inculpatory accomplice testimony if it believed the testimony beyond a reasonable doubt," which "was essentially the same instruction as was given by the court." *Ibid.*

In any event, there is no merit to petitioner's claim that the jury instruction here was similar to the instruction in *Cool* in that it required the jury to find the *exculpatory* accomplice testimony true beyond a reasonable doubt before considering that testimony. The district court in this case instructed the jury that "[y]ou should never *convict* a Defendant upon the unsupported testimony of an alleged accomplice unless you believe that unsupported testimony beyond a reasonable doubt." Pet. App. 4a (emphasis added). Unlike the instruction in *Cool*, therefore, the instruction here simply required the jury to find that the *inculpatory* accomplice testimony was true beyond a reasonable doubt as a predicate to convicting petitioner on the basis of the testimony.

Nor is there merit to petitioner's argument that his conviction should be reversed because the district court did not explicitly tell the jury that it could acquit him based on the exculpatory accomplice testimony. Unlike the situation in *Cool* where the only accomplice testimony was exculpatory, the testimony of two of petitioner's accomplices was inculpatory. Thus, there was nothing inherently confusing in this case about an instruction regarding the jury's use of inculpatory accomplice testimony. Moreover, unlike the situation in *Cool*, where the defendant objected to the accomplice instructions, petitioner's attack on the jury instruction is subject to review under the "plain error" doctrine. That doctrine authorizes a reviewing court "to correct only 'particularly egregious errors,' * * * [and] is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'" *United States* v. *Young*, 470 U.S. 1, 15 (1985) (quoting *United States* v. *Frady*, 456 U.S. 152, 163 & n. 14 (1982)). See also *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977) (in reviewing jury instructions, the plain error doctrine must be reserved for the "rare case"). Here the jury was told that it could convict on the basis of the inculpatory accomplice testimony, but only if "you believe that unsupported testimony beyond a reasonable doubt." Pet. App. 4a. There is no reason to believe that the jury did not understand that it must acquit petitioner if, on account of any evidence—including the exculpatory evidence provided by some of his accomplices—it had a reasonable doubt about petitioner's guilt. Thus, under the facts of this case, the court of appeals correctly concluded that the failure specifically to instruct the jury on the manner in which it

might evaluate the exculpatory accomplice testimony did not rise to the level of plain error. Pet. App. 6a.[3]

2. Petitioner also contends (Pet. 16-24) that Anita Sackett's testimony concerning his direction to inflate the building loss portion of the insurance claims resulted in a constructive amendment of the indictment. In petitioner's view, that testimony created an alternative theory for the jury to find that he had engaged in a scheme to defraud the insurance companies.

A constructive amendment occurs when the evidence at trial or the jury instructions broaden the scope of the indictment by allowing a defendant to be convicted of an offense different from that charged in the indictment. See *United States* v. *Miller*, 471 U.S. 130, 135-145 (1985); *Stirone* v. *United States*, 361 U.S. 212, 218-219 (1960). That did not happen here. As the court of appeals concluded, the proof at trial established the same mail fraud scheme that was alleged in the indictment: a scheme to defraud insurance companies by intentionally setting fires to residential homes and using the mails to collect the insurance proceeds. The jury instructions required the jury to find that petitioner engaged in that scheme in order to find him guilty of the mail fraud offenses. Pet. App. 10a.

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[3] Petitioner asserts that the decision of the court of appeals is inconsistent with the Sixth Circuit's prior decision in *United States* v. *Stulga*, 531 F.2d 1377 (1976). As the court of appeals explained, however, the defendant in *Stulga* specifically requested that the jury be instructed on how to evaluate exculpatory accomplice testimony. Pet. App. 5a. In addition, unlike this case (but like *Cool*), there was a possibility in *Stulga* that the jury thought it had to find exculpatory accomplice testimony true beyond a reasonable doubt in order to acquit. *Id.* at 5a-6a. In any event, intracircuit conflicts do not justify review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

Contrary to petitioner's contention, the evidence that the building loss portions of the insurance claims were inflated did not alter an essential or material element of the mail fraud scheme charged in the indictment. As petitioner acknowledges (Pet. 17), the evidence at trial showed that the insurance companies regularly reduced by 30 to 50 percent the amount of the claims. The evidence that the building loss portions of the insurance claims were inflated directly implicated petitioner in the arson scheme, for it showed how he and his co-defendants profited from the scheme and why they had a motive to participate in it.

3. Petitioner also contends (Pet. 24-27) that he is entitled to a new trial under Fed. R. Crim. P. 33 because the guilty verdicts were against the great weight of the evidence. Rule 33 allows a district court to grant a defendant a new trial "if required in the interest of justice." Petitioner's argument that the guilty verdicts were against the great weight of the evidence rests on his claim that the testimony of Al Meredith, Sr., was unworthy of belief. However, the fact that the jury acquitted petitioner on 13 counts while convicting him on ten counts strongly suggests that the jury carefully evaluated all the evidence in this case, including the testimony of Al Meredith, Sr. In any event, both the district court and the court of appeals correctly concluded that, apart from the testimony of Al Meredith, Sr., the other evidence showing that petitioner controlled the arson operation was sufficient to support the jury's guilty verdicts. Pet. App. 8a. Besides the circumstantial evidence of petitioner's involvement in the operation, Anita Sackett's testimony implicated

petitioner as the mastermind of the arson scheme.[4] Petitioner's fact-specific contention regarding the sufficiency of the evidence other than the testimony of Al Meredith, Sr., does not warrant further review.

4. Finally, petitioner contends (Pet. 27-28) that he was denied a fair trial because the district judge vouched for the credibility of the prosecution by commenting on the honesty of the Assistant U.S. Attorney in the presence of the jury. That contention is meritless. As the court of appeals explained, the district judge's reference to the honesty of the Assistant U.S. Attorney was an isolated comment at the beginning of the trial during a general discussion concerning the identification and introduction of the government's exhibits. Contrary to petitioner's contention, the court's comment does not establish that the district judge either assumed the role of an advocate for the prosecution or conveyed to the jury a belief that petitioner was guilty. Taken in context, the comment merely reflected the district judge's belief that the Assistant U.S. Attorney would accurately keep track of the exhibits that were received into evidence. In light of the district court's favorable comments during the jury charge on the professionalism of all the lawyers in the case, the comment about the Assistant U.S. Attorney at the beginning of the trial could not conceivably have prejudiced petitioner's right to a fair trial.

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[4] Petitioner argues that for purposes of the new trial motion, Sackett's testimony should be disregarded since, according to petitioner, her testimony should have been struck under Fed. R. Evid. 404(b). As we have argued above, however, Sackett's testimony was relevant and admissible and therefore was properly considered in connection with petitioner's motion for a new trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1990

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